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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 353

RESERVE LIFE INSURANCE COMPANY, a corporation,
Petitioner

v.

DR. E. H. NORTH, JR., *Respondent*

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Where a purely non-federal cause of action based upon alleged "gross fraud" has been tried by a United States District Court under applicable state law and decisions, affirmed on appeal by the United States Court of Appeals, should certiorari be granted?

STATEMENT OF THE CASE

Petitioner was the plaintiff in the courts below, and respondent is and was a highly respected medical doctor, practicing in Elizabeth City, N. C. This action was brought in the U. S. District Court for the Eastern District of North Carolina, at Elizabeth City, jurisdiction being based upon diversity of citizenship.

(P. Ap. will apply to plaintiff's appendix to brief, and D. Ap. will apply to defendant's appendix to brief.)

In September, 1951, plaintiff issued a hospital and surgical expense policy to one Cudworth, who was thereafter a patient of the defendant doctor between the dates of November 23, 1951, and December 2, 1951. The defendant had treated the patient for pneumonia. The doctor did not at any time diagnose Cudworth's condition as being either tuberculosis or carcinoma. (D. Ap. 9-10.)

Plaintiff had alleged fraud predicated upon defendant's failure to include tuberculosis and carcinoma in the Company's printed form (Plaintiff's Exhibit 7) which the defendant doctor had filled in on the day the patient was discharged from the hospital. The form (P. Ap. 160) called for the *sicknesses* for which the doctor had *treated* the patient. While the patient was in the hospital the doctor suspected pulmonary tuberculosis or possible bronchogenic carcinoma. Various tests were made, and, based upon the negative results, the suspicion was removed and the doctor never at any time diagnosed Mr. Cudworth's condition as being either tuberculosis or carcinoma. (D. Ap. 9). The treatment administered Mr. Cudworth while a patient in the hospital was for pneumonia. He had symptoms of this disease before he was sent to the hospital and while there. "If I had thought that he probably had tuberculosis or possibly had carcinoma, as his attending physician, I would not have discharged him on December 2, 1951, and let him go home. (D. Ap. 13). I approached the completion of this paper identified as P-7, from a view-

point of what I treated Mr. Cudworth for and what I knew he had." (D. Ap. 16).

The defendant testified, without contradiction, that the diagnostic hospital record, upon which plaintiff predicates the alleged fraud, could easily have been made up many months after the November-December, 1951, confinement, and could even have been made up after Mr. Cudworth's death. (D. Ap. 14; 22-23). Cudworth had not been defendant's patient in March and April of 1952, at which time Cudworth was a patient of other doctors in Norfolk, Virginia, and it was only after surgery there that carcinoma was found. It was also definitely determined at that time that the patient did not have tuberculosis.

At the time the defendant doctor filled in the hospital form complained of, he knew nothing of the contents of any policy of insurance which the patient might have had with the plaintiff company. The amount then involved was $76.50, in no part of which the defendant doctor had any pecuniary interest.

The remaining actual damages alleged by plaintiff, $1643.72, represented largely attorneys' fees paid by plaintiff in unsuccessfully defending a suit in a North Carolina State Court, brought on the hospital policy by the insured's administrator for hospital and medical expenses incurred after the insured ceased to be a patient of the present defendant.

In the instant suit, the jurisdictional requirement as to amount involved was allegedly met by incorporating punitive damages.

A jury trial was waived, and, among other facts, the District Judge found the following key fact:

> "Upon receiving negative results from testing the patient for the same (carcinoma or tuberculosis) the defendant eliminated them in his mind as being the nature of Cudworth's illness, and this was the status of the defendant's mind at the time the Physician's Hospitalization Statement was completed. In view of its tendency in this direction, it is the opinion of the Court that the evidence does not clearly establish in accordance with the plaintiff's burden of proof that the defendant's statement was made either with knowledge of its falsity, or with a reckless disregard for its truth." (P. Ap. 14).

Good faith is peculiarly pertinent in a fraud charge. The trial Court had, among others, this evidence of the defendant doctor:

> "I have never made reports or statements to the plaintiff in reference to Mr. Cudworth which were not based upon my honest opinion and conviction as a doctor. I have never knowingly withheld any information from the plaintiff company. I have never made any representation to the plaintiff company in referring to Mr. Cudworth, not caring or knowing whether they were true or false. I have at all times acted in good faith with the plaintiff company, especially in regard to Mr. Cudworth in his hospitalization in 1951." (D. Ap. 36-37, narrated).

ARGUMENT

The case was tried, and reviewed on appeal, under applicable North Carolina decisions as to actionable fraud, and presents no situation contemplated by Rule 19 of this Court:

(1)

We do not understand that petitioner claims in its brief or otherwise that the asserted cause of action is not local in nature and controlled by North Carolina decisions.

In non-federal matters, of course, the elements of fraud are now determined by state law.

Moore's Federal Practice, Vol. 2, at p. 1907.

Long before *Erie Railroad Co.* v. *Tompkins*, 304 US 64, this Court had held that questions in relation to fraud are generally regarded as local questions, as to which decisions of the state court are controlling.

Dooley v. *Pease*, 180 US 126.

The trial Court in its judgment (P. Ap. 14) had set out the four requisites of actionable fraud as enumerated in *Harding* v. *Insurance Co.*, 218 NC 129, 10 SE 2d. 680, one of which was "made with knowledge of its falseness or with a reckless disregard for its truth."

To the same effect is the more recent North Carolina case, also cited in the judgment, *Early* v. *Eley*, 243 NC 695; 91 SE.2d. 919.

There is no suggestion in plaintiff's petition, and rightly so, of absence of evidence to support this crucial finding in the trial Court's judgment:

> "Upon receiving negative results from testing the patient for the same (tuberculosis and carcinoma) the defendant eliminated them in his mind as being the nature of Cudworth's illness, and this was the status of the defendant's mind

at the time the Physician's Hospitalization Statement was completed." (P. Ap. 14).

If this Court's definition of actionable fraud were controlling, petitioner could find no consolation therein. Six elements were stated in *Southern Development Co.* v. *Silva*, 125 US 247, one of those requisites was "That such representation was not actually believed by the defendant, on reasonable grounds."

(2)

Whether there was or was not a trust relationship between plaintiff and defendant, as related to the law of fraud, is not controlling on this record.

A trust relationship only dispenses with the proof of one of the fraud elements, i.e., the intention to deceive.

> *Miller* v. *Bank*, 234 NC 309, 316; 67 SE 2d 362; 37 C.J.S. 211.

As was said in the *Miller* case, *supra*, constructive fraud differs from active fraud in that the intent to deceive is not an essential element, but it is nevertheless fraud though it rests upon presumption arising from breach of fiduciary obligation rather than deception intentionally practiced.

In the *Miller* case, *supra*, the plaintiff had alleged "a breach of the fiduciary obligation", etc. It is interesting to observe that fiduciary relationship, so much relied upon by petitioners in retrospect, is not even alleged in its complaint, though FRCP 9(b) requires that the circumstances constituting fraud shall be stated with particularity.

Actionable fraud is a chain of several links, and where a requisite link is missing there is no chain.

The absence of anyone of the elements of fraud is fatal to a recovery.

McNair v. *Finance Co.*, 191 NC 710, 717; 133 SE 85.

There can be no actionable fraud without a concurrence of all the matters deemed to be elements thereof in the particular jurisdiction.

37 C.J.S. 218.

The three North Carolina cases cited in the petition were included in appellant's brief in the Court of Appeals. The language of the opinion in that Court is appropriate:

> "Even if a fiduciary relationship had existed, it would not have eliminated the burden which rested on plaintiff to prove that defendant's statement was made either with knowledge of its falsity or with reckless disregard for its truth." (Petition at p. 4 a.)

CONCLUSION

In the light most favorable to petitioner, the case boils down to one in which upon conflicting evidence the trial Court chose between two permissible views of the weight of the evidence. Hence his findings cannot therefore be disturbed as being "clearly erroneous." (FRCP 52(a)).

United States v. *Yellow Cab Co.*, 338 US 338.

Petitioner, by inference, bases its prayer for relief on the premise that the issuance of policies of hospital

insurance is big business. The protection of the professional reputation of a doctor may not be big business, but certainly it is important business.

It is respectfully submitted that the judgment and decision herein should not be disturbed, and that the petition for certiorari should be denied.

Respectfully submitted,

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